STATE OF MICHIGAN

COURT OF APPEALS

TERRY R. BLUNDELL,

Plaintiff-Appellant,

v

BRIAN WHITSITT,

Defendant-Appellee,

and

MARK ALLEY and TONY BENAVIDES,

Defendants.

UNPUBLISHED
January 30, 2007

No. 272015
Ingham Circuit Court
LC No. 05-000910-CZ

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant Brian Whitsitt, a police officer (defendant), appeals as of right denying his motion for summary disposition based on the conclusion that he was not entitled to governmental immunity.[1] We reverse and remand for entry of judgment in favor of defendant. This appeal is being decided without oral argument. MCR 7.214(E).

Plaintiff called the police after allegedly being assaulted at a Lansing bar. Defendant responded to the scene, and allegedly challenged plaintiff's claim that he had been assaulted. Plaintiff apparently advised defendant that he was a lawyer and that he knew what constituted an assault. Plaintiff claims that while he was standing near defendant, relaxed with his hands in his pockets, defendant poked his index finger into plaintiff's chest, causing a welt. Plaintiff apparently advised defendant that he had just assaulted him. Defendant allegedly said that he did not care if plaintiff was a lawyer, and that plaintiff "should not get in his face with his hand in his pockets." Defendant claimed that, rather than standing relaxed with his hands in his pockets, plaintiff was agitated and was aggressively approaching him. Defendant further asserted that

[1] The trial court granted summary disposition in favor of defendants Mark Alley and Tony Benavides, who are not parties to this appeal.

rather than poking his finger into plaintiff's chest, he had simply extended his arm with palm raised to ward plaintiff off.[2]

Plaintiff filed a four-count complaint alleging intentional assault, intentional battery, intentional infliction of emotional distress, and a claim based on 42 USC 1983. The trial court found that a question of fact existed regarding whether plaintiff was moving toward defendant at the time of the touching. The court concluded that defendant would not be immune from liability for intentional torts if he was acting outside the scope of his authority. The court further concluded that if there was "an offensive, intentional assaultive battery, not done for self defense or to carry out one's responsibilities," then it would be actionable either under common law intentional tort theories or as a § 1983 claim.

> Qualified immunity for a § 1983 claim is determined based on the following analysis: When confronted with a claim of qualified immunity, a court must ask first the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v Katz*, 533 US [194, 201; 121 S Ct 2151; 150 L Ed 2d 272 (2001)]. . . . [T]he constitutional question in this case is governed by the principles enunciated in *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985), and *Graham v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989). These cases establish that claims of excessive force are to be judged under the Fourth Amendment's "'objective reasonableness'' standard. *Id.* at 388.
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> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. *Saucier*[, *supra* at 206] (qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force'"). Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation. [*Brosseau v Haugen*, 543 US 194, 197-198; 125 S Ct 596; 160 L Ed 2d 583 (2004).]

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[2] Plaintiff complained to the police department regarding this incident, also noting that defendant had refused to make out a police report regarding the original alleged assault for which defendant was called to the bar. Although plaintiff's complaint to the police department was "sustained," it is not clear whether the department concluded that defendant had acted wrongfully, or whether the department simply concluded that defendant had in fact failed to take a report as requested.

This Court has previously addressed these principles in the context of qualified immunity for police officers See *VanVorous v Burmeister*, 262 Mich App 467, 473; 687 NW2d 132 (2004). In *VanVorous*, we noted:

> In determining the reasonableness of the officer's actions, the Court must give close attention to "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers and others, and whether he is actively resisting arrest or attempting to evade arrest by flight." . . . . This is an objective analysis "judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight." The Court must recognize that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." [Officers] will not be shielded by qualified immunity "if, on an objective basis, it is obvious that no reasonably competent officer would have [resorted to force of the type used]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." Put another way, "the central legal question is whether a reasonably well-trained officer in the defendant's position would have known that [resorting to force of the type used] was unreasonable in the circumstances." [*Id.* at 473-474 (citations omitted)].

Viewed in the light most favorable to plaintiff, the facts are that plaintiff was relaxed and stationary with his hands in his pockets when defendant poked him in the chest. Given that defendant's finger allegedly reached plaintiff's chest, it appears that plaintiff was within an arms-length distance of defendant. Although the alleged touching was perhaps unwarranted in retrospect, we cannot conclude that defendant's actions were objectively unreasonable under the circumstances. Defendant's action was consistent with wanting to create distance between himself and plaintiff so as to diffuse any threat that might have been perceived from plaintiff's proximity or any possible object in plaintiff's pocket. Having reviewed the totality of the evidence presented below, we conclude that defendant did not act unreasonably in what could have been a "tense," "uncertain," or "rapidly evolving" situation. Defendant was entitled to qualified immunity on the § 1983 claim.

We also conclude that the intentional infliction of emotional distress claim must fail as a matter of law. To sustain a claim of intentional infliction of emotional distress, a plaintiff must show that the defendant's action was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004), quoting *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). When reasonable minds could not differ, it is for the court to decide whether the defendant's conduct could reasonably be regarded as so extreme and outrageous as to permit recovery. *Hayley*, *supra* at 577. When taken in a light most favorable to plaintiff, the facts in this case do not establish that defendant's conduct was sufficiently atrocious, extreme, or outrageous to support plaintiff's claim. At best, they show what might be characterized as an overreaction to a situation that was reasonably perceived to be potentially threatening.

Regarding the intentional assault and intentional battery claims, a police officer may use the force reasonably necessary to make an arrest. *VanVorous, supra* at 480. Further, although government employees are generally not protected against liability for intentional torts, *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997), if the acts that are purportedly intentional torts were justified, governmental immunity applies, *VanVorous, supra* at 480. See also *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984).

Although no arrest was involved here, we conclude that defendant's actions in this case were "justified" under the circumstances. Since plaintiff was within an arm's length of defendant with his hands in his pockets, an alleged finger to the chest in the heat of the moment was not so egregious that it should be regarded as unreasonable. Thus, defendant was entitled to summary disposition on the intentional assault and intentional battery claims. *VanVorous, supra* at 480.

Reversed and remanded for entry judgment in favor of defendant. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper